

*United States Court of Appeals
for the Second Circuit*



**INTERVENOR'S
BRIEF**

CONFIDENTIAL

75-4132

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
NO. 75-4132

WESTERN UNION INTERNATIONAL, INC.,

Petitioner,

- against -

THE FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents,

ITT WORLD COMMUNICATIONS INC., THE WESTERN
UNION TELEGRAPH COMPANY, AND STATE OF
HAWAII,

Intervenors.

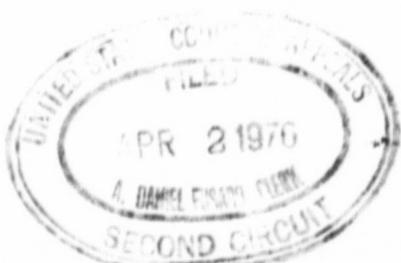
Petition For Review Of A Memorandum Opinion and
Order of the Federal Communications Commission

BRIEF OF INTERVENOR
STATE OF HAWAII

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BRIEF OF INTERVENOR
STATE OF HAWAII

I. Preliminary Statement

Intervenor, State of Hawaii ("State") submits this brief in support of affirmance of a Memorandum Opinion and Order ("Order") released by the Federal Communications Commission ("Commission")
^{1/}
on June 23, 1975. In that Order, the Commission held that Western

^{1/} The Commission's Order is reproduced in the Appendix at A7-A60 and is reported at 55 F.C.C.2d 668.

Union Telegraph Company ("WU") is not barred by Section 222 of the Communications Act of 1934, as amended ("Act") 47 U.S.C. § 222, from consideration to provide Mailgram service between the the United States mainland and Hawaii.

II. Statement of the Issue Presented For Review

Whether Section 222 of the Act bars WU from providing Mailgram service between the United States mainland and Hawaii?

III. Statement of the Case

On April 4, 1972, WU filed with the Commission, pursuant to Section 214 of the Act, an application to provide Mailgram service ^{2/} between the United States mainland and the State of Hawaii.[—] Hawaii is the only state to which the benefits of Mailgram service are not ^{3/} extended.[—]

Mailgram is a new and innovative form of record, as opposed to voice communication introduced in 1970 under a joint arrangement between WU and the United States Postal Service ("Postal Service"). While a Mailgram is originated and transmitted over WU's domestic ^{4/} communications network as any traditional telegram,[—] a significant distinction is that the delivery function of a Mailgram is the sole

2/ WU's Application to provide Mailgram service between the United States mainland and Hawaii is reproduced at A71-A103.

3/ Two-way Mailgram service is available to all 49 other states including Alaska which is not a contiguous state, and to inbound messages from Canada. See the Order at A19.

4/ The traditional telegram is also referred to as public message service or "PMS".

responsibility of the Postal Service. A Mailgram is not routed to a WU facility for delivery; rather it is transmitted to a WU tele-printer installed in a United States Post Office (called a Serving Post Office or SPO) serving the zip code area designated in the address, where it is printed on special paper, placed in a special envelope and placed in the mail for delivery with the next regular mail delivery.

As previously noted, the Mailgram differs from the traditional telegram in a number of ways. With Mailgram service, the Postal Service bears the total and complete responsibility for the delivery of the Mailgram, and Mailgrams are subject to the practices of the Postal Service. Mailgram service does not offer messenger, telephone or other expedited delivery procedures associated with conventional telegrams.

On April 19, 1972, the Commission's Common Carrier Bureau refused to accept WU's application for filing.^{5/} On May 19, 1972, WU filed an application with the Commission to review the decision of the Common Carrier Bureau.^{6/} In a Memorandum Opinion and Order released on June 23, 1975, the Commission reversed the decision of its Common Carrier Bureau and directed the Bureau to accept for filing and to consider the WU application.

5/ For a more complete description of Mailgram service, see the Order at A23-A24.

6/ See Letter of April 19, 1972, from the Chief, Common Carrier Bureau to WU at A61-A70.

7/ WU's Application for Review of Action Taken Pursuant to Delegated Authority is reproduced at A112-A135.

On July 2, 1975, Western Union International, Inc. ("WUI") filed a Petition for Review of the Commission's Order, in this Court.^{8/} ITT World Communications, Inc. ("ITT Worldcom"), WU and the State of Hawaii have intervened.^{9/}

IV. Argument

SECTION 222 OF THE ACT DOES NOT BAR WU FROM PROVIDING MAILGRAM SERVICE BETWEEN THE UNITED STATES MAINLAND AND HAWAII

The narrow legal issue raised in this appeal is whether the Commission correctly interpreted Section 222 of the Act. Section 222 was enacted as part of the Act in order to permit the merger of WU and Postal Telegraph Cable Company ("Postal"), its only competitor in the provision of domestic PMS. Section 222(c)(2) provided ". . . for the divestment of the international telegraph operations theretofore carried on by any party to the consolidation or merger. . . ."^{10/} (Emphasis added.)^{11/} Mailgram is a new and innovative service of WU. Since it was not provided by WU at the time of its merger with Postal, the Commission correctly determined that Section 222 does not bar WU from consideration to provide Mailgram service between the United States mainland and Hawaii.

8/ WUI's Petition for Review is reproduced at A1-A3.

9/ See pp. A279-A319.

10/ See Act of March 6, 1943, ch. 10, § 222(c)(2), 57 Stat. 7, codified at 47 U.S.C. § 222(c)(2).

11/ Furthermore, one additional point is worth noting here. The Commission merely determined that WU is not barred by Section 222
[continued on following page]

A. Section 222 of the Act has Resulted in Discrimination Against the State of Hawaii and Should Be Strictly Construed.

For purposes of Section 222, Hawaii is an "international" point. Congress, in enacting Section 222, was concerned with geographical location of service points, rather than political status in classifying points as domestic or international. Even after Hawaii's admission to statehood, Congress amended the Act to continue Hawaii's designation as an international point for purposes ^{12/} of Section 222.

Hawaii's designation as an international point has had profound adverse effects on the provision of telecommunications services for its citizens. Hawaii's citizens do not receive all the telecommunications services enjoyed by citizens of her sister states, and Hawaii's citizens often are charged rates two or three times in excess of those charged citizens on the mainland for comparable ^{13/} services. This discrimination is a matter of record.

^{11/} [continued from preceding page] of the Act from pursuing its application, but did not pass on its merits. In addition to WU, RCA, ITT Worldcom, WUI, Hawaiian Telephone Company and Domestic Satellite Corporation have proposals to offer services similar to Mailgram, now pending before the Commission. Thus the issue raised in this appeal may be rendered moot if the Commission ultimately determines not to authorize WU to provide the service.

^{12/} See Section 222(a)(10) which excludes Hawaii from the term "continental United States". See also Section 222(a)(6) which defines "international telegraph operations".

^{13/} See S. Rep. No. 94-533, 94th Cong., 1st Sess., 9-12 (1975).

A broad interpretation of Section 222 would perpetuate the historic discrimination imposed upon the State and its citizens. Therefore Section 222 should be strictly construed and interpreted only to the extent necessary to achieve the clear Congressional intent.

Under Section 1 of the Act, 47 U.S.C. § 151, the Commission has been charged with the responsibility of assuring the people of the United States rapid and efficient communications services at reasonable charges. The Commission has been granted broad flexible powers to achieve our nation's communications goals.^{14/} However, since its admission to statehood, Hawaii too often has been an afterthought in this process. In this case, the Commission has determined that the State of Hawaii is entitled to Mailgram service and that WU is to be given consideration as to whether it should be authorized to provide it. Unless there is a clear legislative mandate to the contrary, the Commission should not be divested of its discretion to decide whether WU, and/or any other carrier, should be authorized to provide this service.

Since the Commission has determined only that WU's Mailgram application should receive consideration, the Commission pursuant to its broad statutory authority, has the opportunity to limit or remedy the potential competitive abuses raised by WUI and ITT Worldcom,

^{14/} See, e.g., United States v. Southwestern Cable Co., 392 U.S. 157 (1968); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); F.C.C. v. RCA Communications, Inc., 346 U.S. 86 (1953).

if appropriate, by placing conditions on its grant of the application. Alternatively, it could ultimately deny the application on its merits, because of the potential for abuses or other reasons. The Commission's interpretation of the statute which it administers is certainly entitled to great weight and the its analysis of the factual issues -- what is Mailgram service and how does it differ from PMS -- certainly rests within its area of special competence.^{15/} However, the State submits that the public interest would not be best served by foreclosing the possibility of WU being selected as a provider of the service.

B. Section 222 Is Only A Bar to WU's Engaging
In International Telegraph Operations Which
It Carried On At The Time Of Its Merger
With Postal

Section 222 required WU to divest the international telegraph operations it had "theretofore carried on". This required WU to divest the international telegraph operations which it was engaged in at the time of its merger with Postal.

15/ See F.C.C. v. RCA Communications, Inc., supra, at 90-91, where the Supreme Court stated:

"[T]he scope of this Court's duty to review administrative determinations under the Federal Communications Act of 1934 . . . has been carefully defined. Ours is not the duty of reviewing determinations of 'fact' in the narrow colloquial scope of the concept. Congress has charged the courts with the responsibility of saying whether the Commission has fairly exercised its discretion within the vaguish penumbra bounds expressed by the standard of 'public interest'. It is our responsibility to say whether the Commission has been guided by proper considerations in bringing the deposit of its experience, the disciplined feel of the expert, to bear on applications for licenses in the public interest."

WUI and ITT Worldcom assert that Section 222 required WU to divest itself of, and never thereafter engage in, international telegraph operations. In this respect they argue that the phrase "theretofore carried on" was not intended to limit the divestment requirement. However WUI concedes that Congress did not elaborate on what it meant by "theretofore carried on".^{16/} Nevertheless, WUI and ITT Worldcom attempt to expand the scope of that section far beyond its clear and unambiguous meaning.

Where resort to legislative history further clouds a statute's meaning, as in the case here, the clear language is the best means of interpreting Congress' intent. As the Supreme Court stated in United States v. Great Northern Railway Co., 343 U.S. 562, 575 (1952):

"It is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written. . . ."

And in 62 Cases of Jam v. United States, 340 U.S. 593, 596 (1951),

Justice Frankfurter, writing for the Court, stated:

"[O]ur problem is to construe what Congress has written. After all, Congress expresses its purposes by words. It is for us to ascertain -- neither to add nor to subtract, neither to delete nor to distort."

Indeed, in United States v. Missouri Pacific Railroad Co., 278 U.S. 269, 278 (1929), the Supreme Court also stated that:

"***Where doubt exists and construction is permissible, reports of the committees of Congress and statements by those in charge of the measure and other like extraneous matter may be taken into consideration to aid in the

16/ See WUI Brief at 23.

ascertainment of the true legislative intent. But, where the language of an enactment is clear and construction according to its terms does not lead to absurd or impractical consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed."
(Citations omitted.)

WUI and ITT Worldcom have attempted to interpret Congress' intent by drawing an analogy to the potential anticompetitive evils of the WU-Postal merger, at which the divestment clause was aimed. This analogy does not fit the instant matter. In Mailgram, WU's potential for engaging in anticompetitive activity vis-a-vis the international carriers, is virtually extinguished, or at least severely limited, by the active participation of the Postal Service, "an independent establishment of the executive branch of the Government of the United States. . . ." ^{17/} It is inconceivable that the Postal Service would serve as partner or act in concert with WU in any anticompetitive activity. In this respect, ITT Worldcom states its view that the only rational test of whether this service is within Congress' prohibition is to examine whether WU would have the opportunity to misuse its ^{18/} domestic monopoly, if it were authorized to provide the service. Thus, since there is a significant limitation on the potential for the anticompetitive evils which necessitated enactment of Section 222, there is no basis for interpreting that section beyond its plain language.

17/ 39 U.S.C. § 201.

18/ See ITT Worldcom Brief at 31.

C. Mailgram Is A New And Innovative Service
Not "The retofore Carried On"

Mailgram is a new and innovative service distinct from the traditional telegraph service which WU offered in 1943, and which formed the basis of the WU-Postal Merger.^{19/} While WUI and ITT Worldcom cite prior Commission orders and case precedents to establish that Mailgram is essentially traditional telegraph service, their reliance on those precedents is clearly misplaced. In short, WUI and ITT Worldcom have failed to prove that the Commission erred in its determination that Mailgrams and telegrams have distinct characteristics. In fact, ITT Worldcom's assertion that the only difference between a Mailgram and a telegram is whether WU or the Postal Service pays the salaries of the personnel involved in the delivery process is a gross distortion of fact. The Commission is very familiar with the physical characteristics of the services it regulates. Once the Mailgram is transmitted to a Serving Post Office ("SPO"), it is subject to the practices of the Postal Service, and the federal statutes and Postal Service regulations pertaining to the mails are applicable to Mailgrams. This is not true of public message service as conducted by WU at the time Section 222 was adopted. The distinction is discussed above.^{20/}

19/ A complete description of Mailgram service and its characteristics which distinguish it from public message service are fully set forth in the Order at A22-27.

20/ See pp. 2-3, supra.

The active involvement of the Postal Service as a joint offeror and the use of the mails as the only means of distribution to the recipient, is a far cry from the priority message service routes to a WU facility for distribution by messenger, or by telephone, where mail distributed by the WU receiving office was not a primary thrust of the service, and the Postal Service's involvement was incidental.

United Telegraph Workers, AFL-CIO v. F.C.C., 436 F.2d 920 (D.C. Cir. 1970), cited by both WUI and ITT Worldcom supports the Commission's determination that Mailgram is a new and innovative service. The specific issue in that case was whether Mailgram is a "new line or channel of communication" which required Commission authorization in the form of a certificate of convenience and necessity pursuant to Section 214 of the Act, a determination far different from a "new service".^{21/} Although finding that Mailgram was not a new line or channel of communication, the District of Columbia Circuit recognized that it was a new and innovative service, stating:

"The experimental nature of the service now before us is equally significant. The Commission has a mandate under § 218 of the Act, 47 U.S.C. § 218 (1964), to inform itself of technical advancements and improvements in modes of communication so that 'the benefits of new inventions and developments may be made available to the people of the United States.'

^{21/} A carrier may initiate new services by filing a tariff under Section 203 of the Act, provided it does not need a new line to offer the service. If the carrier needs a new line to offer an existing service, or to offer a new service, it must obtain authority under Section 214 of the Act. If such new line involves the use of radio channels, authority under Title III of the Act is also necessary.

This expression of congressional desire that the Commission encourage technological innovation requires us to demand a compelling showing of legislative prohibition before we strike down an experiment such a [sic] Mailgram which is designed to furnish the informational input that makes such innovation possible." 22/

Furthermore, the case of Telegraph Service with Hawaii 28 F.C.C. 599 (1960), cited by WUI and ITT Worldcom, has no relevance to this case. There, the issue was whether public message telegraph service with Hawaii would be a domestic telegraph operation in light of Hawaii's admission as a state. The Commission determined that Hawaii's change in political status was irrelevant for purposes of its status under Section 222, and that WU's traditional telegraph service would still be an international operation with regard to Hawaii. The Commission decision in Telegraph Service with Hawaii is not precedent in the instant case since WU is not attempting to provide its traditional telegraph service to Hawaii, but a new and innovative service.

22/ 436 F.2d at 923-924.

V. Conclusion

For the foregoing reasons, Intervenor, State of Hawaii, respectfully requests this Court to affirm the Memorandum Opinion and Order released by the Federal Communications Commission on June 23, 1975.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Herbert E. Marks, hereby certify that the foregoing Brief of Intervenor State of Hawaii was served this 1st day of April, 1976, by mailing copies thereof, postage prepaid, to the following persons at the addresses shown below:

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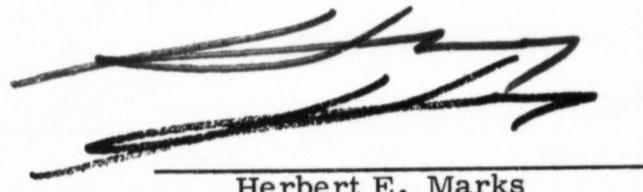
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